

JOSEPH T. KURKOWSKI

IBLA 76-259

Decided February 23, 1976

Appeal from decision of the District Manager, Miles City District Office, Montana, Bureau of Land Management, rejecting appellant's conflicting grazing lease application.

Affirmed.

1. Conflict of Interest -- Federal Employees and Officers: Members of Congress -- Grazing Leases: Generally -- Statutory Construction: Generally

One of the functions of the Department of Justice is to construe the laws under which other Government Departments act, 28 U.S.C. § 512 (1970), and when the Department of Justice has advised the Department of the Interior that it has construed a conflict of interest statute affecting Members of Congress and has determined that it is permissible for the spouse of a Member of Congress to hold a grazing lease for national resource lands under certain circumstances, that opinion is binding on this Department, and a grazing lease is properly issued when the applicant has satisfied the criteria set forth by the Department of Justice.

APPEARANCES: Joseph T. Kurkowski, pro se; A. E. Bielefeld, Field Solicitor, United States Department of the Interior, Billings, Montana, for the Bureau of Land Management; J. F. Meglen, Esq., Billings, Montana, for Ruth E. Melcher.

OPINION BY ADMINISTRATIVE JUDGE RITVO

STATEMENT OF THE CASE

This matter originated before the Board in an earlier decision, Joseph T. Kurkowski, 15 IBLA 13 (1974), which resulted from Mr. Kurkowski's appeal from a decision of the District Manager, Miles City District Office, Montana, Bureau of Land Management (BLM), requiring him to agree to the stipulation of a stock access in favor of Congressman John Melcher as a condition precedent to the issuance of a grazing lease applied for under section 15 of the Taylor Grazing Act of June 28, 1934, as amended, 43 U.S.C. § 315m (1970). The Board held that the proscriptions within 18 U.S.C. § 431 (1970), made the holding of a stock access on federal grazing land by a Member of Congress unlawful and void. An adequate statement of the factual background of that case is set forth in our earlier decision. To bring the matter up to date, we add the following.

On April 19, 1974, Congressman Melcher and his wife, Ruth E. Melcher, brought an action in the United States District Court for the District of Montana seeking judicial review of the Board's decision. In their complaint, the plaintiffs asked that the Board's decision be reversed, or, in the alternative, sought to have the Court order the Department to exchange the subject tract of public land for private lands owned by the Melchers, or have the Department offer the land for sale to the public or sell it directly to the Melchers. 1/

Thereafter, an opinion and order were entered by the Court dismissing the action for lack of jurisdiction, the Court holding that the Administrative Procedure Act excluded from judicial review "agency action committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1970). John Melcher, et al. v. Edwin Zaidlicz, et al., Civ. No. 74-34 Blg., (D. Mont. September 4, 1974). 2/ The plaintiffs filed a timely notice of appeal and the matter was docketed in the Ninth Circuit Court of Appeals.

1/ See 43 U.S.C. § 315g(b) (1970) for exchange provisions; 43 U.S.C. § 1171 (1970) for sale provisions. Neither the exchange nor sale requests were raised or considered in the original appeal to the Board.

2/ The Court did not reach the issues concerning possible sale or exchange, but noted peripherally that, in any event, these actions were likewise permissive and would similarly not be subject to judicial review.

During the pendency of the judicial appeals, Congressman Melcher, individually, and through counsel, contacted various employees of this Department and the Justice Department in an attempt to resolve the litigation. In this period he made a number of inquiries concerning ways in which he might be able to reacquire access rights to the subject tract without violating the proscriptions in 18 U.S.C. § 431 (1970). Department officials discussed various possibilities with the Congressman, but were uncertain as to the legality of the proposals in light of the criminal statute involved. Furthermore, the Department was reticent to propose any remedial action since the Department has no authority to grant a right under public law contrary to a statute of the Congress. See Joseph T. Kurkowski, supra at 18, and cases cited therein; 18 U.S.C. § 432 (1970).

In order to be properly advised on the matter, on May 30, 1975, the Acting Secretary of the Interior transmitted a letter to the Attorney General, Department of Justice, setting forth the history of the case and stating, in part, the following:

We have discussed various possibilities with the Congressman [concerning resolving the litigation], but have told him that, since this matter involves a criminal statute of general applicability, we are unable to advise him or take any administrative action without the concurrence of the Department of Justice. We therefore seek your advice concerning the following possible courses of action:

* * * * *

4. If the Congressman were to totally divest himself of his interest in the ranching enterprise, by transferring his interest in the business to his wife, and his wife were to provide by will that no interest in the enterprises would pass to the Congressman upon her demise, could the Department then issue a grazing authorization to Mrs. Melcher without a violation of 18 U.S.C. §§ 431-433 thereby occurring?

In a letter dated July 28, 1975, the Department of Justice responded to the Acting Secretary's inquiry by initially noting that the Justice Department was not authorized to provide legal advice to private persons or to individual Members of Congress.

However, since the statutes in question (18 U.S.C. §§ 431-33 (1970)) also impose criminal penalties upon Federal employees who enter into contracts or agreements with Members of Congress, the Justice Department could advise the Department of the Interior regarding the legality of proposed actions. The letter then went on, in part, as follows:

4. Transfer of ranch to the Congressman's wife

Your letter referred to the possibility of Congressman Melcher's transferring his entire interest in the ranch to his wife, and you asked whether after such transfer a grazing authorization could properly be issued to Mrs. Melcher.

In December 1966, an official of the Criminal Division of this Department sent to your Department a letter concerning disposition of certain grazing permits held by * * * [a Senator-elect] and his wife. The letter concluded that, if [he] * * * transferred his interest in the ranch (i.e., the grazing permits, base lands, cattle and related machinery) to his wife or to the trustee of an irrevocable trust whose beneficiaries were [his wife] * * * and their children, the grazing permits could properly be held by [his wife] * * * or the trustee.

Section 431 refers to contracts held by a Member of Congress "directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account * * *." There is no explicit prohibition against contracts made with the Government by the spouse of a Member of Congress. Nor can it be asserted that such a prohibition is implicit, since when Congress, in conflict of interest provisions, has meant to render interests by family members violative it has expressly done so. See 18 U.S.C. 208. 3/ We conclude, therefore, that

3/ Section 208 reads in part:

"(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, participates /personally and substantially as a Government officer or employee * * * in which, to his knowledge, he, his spouse,

if Congressman Melcher transfers the entire interest in his ranch to his wife in such fashion that he would obtain no use of or benefit from any grazing permit subsequently granted, § 431 would not apply.

After receipt of the Justice Department letter, the views expressed therein were brought to the attention of Congressman Melcher. Thereafter, on the 14th of August, 1975, Mr. Melcher did the following: (a) issued a quitclaim deed to his wife for the ranch lands contiguous to the subject tract; (b) issued a bill of sale to his wife for all the personal property and cattle on those base lands; and (c) issued assignments to his wife of cattle brands. From 1955 until 1973, Mr. and Mrs. Melcher had jointly filed for and had been granted a grazing lease for the subject land. Armed with these additional interests, Ruth E. Melcher, on August 19, 1975, filed a grazing lease application in her own name for the land in dispute.

On that same date, the Field Solicitor, Billings, Montana, transmitted to the Associate Solicitor, Division of Energy and Resources, Washington, D.C., copies of the material filed by Mrs. Melcher, so they could be reviewed by this Department and by the Department of Justice. The Field Solicitor commented in a memorandum that it appeared that Mrs. Melcher was a qualified applicant for a grazing lease, and added that counsel for the Melchers had been advised that a "decision of the District Manager is a discretionary decision and, while Mrs. Melcher may be a qualified applicant and the bars to the Melchers' [sic] holding such a lease may have been removed, the final decision rests with the District Manager." Thereafter, the Associate Solicitor advised the Field Solicitor that following receipt of a copy of: (1) a will executed by Mrs. Melcher whereby all of her property interests in the grazing operation were passed to her children and not to her husband; and (2) an affidavit executed by Mr. Melcher stating that he was divesting himself of all interests in the grazing operations in question, there were no undisclosed agreements between him and his wife, or others, whereby he retains any interest or benefit in the grazing operations, and

fn. 3 (continued)

minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest -- shall be fined not more than \$ 10,000, or imprisoned not more than two years, or both." (Emphasis added.)

that he would obtain no use or benefit from any grazing rights that may be granted, the BLM could then entertain an application from Mrs. Melcher for a grazing lease. On August 28, 1975, the Melchers submitted copies of the above-described documents. Upon being informed that the BLM would now consider Mrs. Melcher's lease application in conjunction with the applications from appellant and the Vassau Flying X Ranch, Inc., the Melchers moved to dismiss their appeal to the Ninth Circuit Court of Appeals. On September 11, 1975, the appeal was dismissed.

In a decision dated September 8, 1975, the District Manager, Miles City District Office, BLM, discussed, among other points, prior use of the subject land by the Melchers and their predecessors in interest, and concluded with the following:

With due consideration of the above information and in the interest of good range management and use of the National Resource Land, my decision is as follows:

That the application of Vassau Flying X Ranch, Inc. and Joseph T. Kurkowski be rejected for the reason that the use of this 40 acre tract by either party is strictly supplementary.

That the application of Ruth Melcher be approved for the following reasons:

1. The use of this tract is complimentary [sic] to the ranch operation.
2. The use of this tract has been historical with the Melcher ranch or his [sic] predecessors.
3. The Melcher Ranch can use this tract in the best interest of good range management.

In his statement of reasons on appeal, appellant urges that: (1) a violation of 18 U.S.C. § 431 (1970) still exists as Congressman Melcher will still benefit as long as he is legally married to Ruth and * * they are in the same household;" (2) the conditions of the sale were simply a "ploy" to avoid the proscriptions of the conflict of interest statute and the actions of the Melchers are without effect and are void; and (3) the method by which the litigation was resolved suggests that "irregularities" occurred.

In his response to appellant's appeal, the Field Solicitor has reviewed the history of the litigation, enclosed copies of the above-mentioned correspondence with the Department of Justice, and concludes that since the conflict of interest statute is non-civil in nature and is enforced by the Department of Justice,

* * * their determination as to its applicability to Mr. & Mrs. Melcher * * * is binding on the Department of the Interior.

Mrs. Melcher has also made an appearance and generally urges that the decision of the District Manager is correct and should be affirmed.

LEGAL ANALYSIS

The primary question before the Department was whether Ruth E. Melcher was disqualified from holding a grazing lease because of her marital relationship with Congressman Melcher, or to put it another way, the Department had to determine whether the issuance of a grazing lease under the circumstances of this case would create an interest in national resource lands proscribed by 18 U.S.C. § 431 (1970). In essence, then, the problem was one of statutory construction of a criminal law.

The statute in issue provides in part that:

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertakes, executes, holds, or enjoys, in whole or in part, any contract or agreement, made or entered into in behalf of the United States or any agency thereof, by any officer or person authorized to make contracts on its behalf, shall be fined not more than \$ 3,000.

All contracts or agreements made in violation of this section shall be void * * *.

As indicated in our earlier Kurkowski decision, this statute has been subjected to review both in the courts and in this Department. In United States v. Dietrick, 126 F. 671 (C.C.D. Neb. 1904), the Court construed the proscriptive language of the act in a broad

manner and declared the wording of the statute to be plain and unambiguous with respect to the provisions prohibiting Members of Congress from entering into contracts or agreements with the United States Government. The Dietrick case, as well as the Departmental decisions in John E. Miles, 62 I.D. 135 (1955), and John L. McMillan, 61 I.D. 16 (1952), specifically dealt with instances where a Member of Congress was personally a party to an agreement with the Government. Therefore, while these cases were helpful towards determining whether the statute should apply in the present instance, the matter was still not without doubt. The Department was faced with the fact that there is no express prohibition in the statute against agreements between the Government and a spouse of a Member of Congress. Accordingly, additional analysis was required in order to resolve the question as to whether a grazing lease issued to Mrs. Melcher would avoid the taint of the conflict of interest statute.

In the Dietrick case, supra at 676, while the Court did not find any ambiguity in the language of the act as it applied to Members of Congress, the Court did concede that:

The construction of a doubtful or ambiguous statute by the Attorney General in the discharge of his duty to render opinions upon questions of law arising in the administration of any of the executive departments is always entitled to respectful consideration, and where that construction is acted upon for a long time by these charged with the duty of executing the statute it ought not to be overruled without cogent reasons. [Citations omitted.]

Given the uncertainty concerning the legality of the proposed actions in the present case, the Department sought the advice of the Department of Justice.

In its correspondence to the Acting Secretary of the Interior, the Justice Department concluded that if Congressman Melcher transferred the entire interest in the ranch to his wife in a manner which would insulate him from any use or benefit from the grazing lease, the proscriptions within 18 U.S.C. § 431 (1970) would be avoided. The Justice Department's determination was predicated upon the resolution of a similar matter which occurred in 1966. Upon request to the Justice Department, the Board received a copy of a letter, dated December 27, 1966, from the Criminal Division to the Office of the Solicitor, which states, in part, the following:

A complete divestment [by a Senator-elect to his wife] of * * * grazing permits, the base lands connected therewith and any machinery or cattle used in that regard, appears to avoid the proscription of 18 U.S.C. 431. With regard to interests owned legally or beneficially by a Congressman's family, the Attorney General has stated:

The interest to disqualify a member from taking or an officer from offering, a contract, must, in my opinion, be an immediate (however indirect) personal interest in its benefits. That he may ultimately profit by the contract -- e.g., as an heir, devisee, etc. -- is not enough. Neither is it enough that his nearest friends or relatives may profit by it. 4 Op. Atty. Gen. 47, at 48-49 (1842).

Further, it is noted that a similar conflict of interest statute, former 18 U.S.C. 434, contained the same "directly or indirectly" language which is found in 18 U.S.C. 431 and the position of this Department was that such language did not include ownership by a wife or child of the official. By statutory amendment, former 18 U.S.C. 434 was made applicable to the interests of the spouse and minor children of an official, (Pub. L. 87-849, Oct. 23, 1962, 76 Stat. 1119). 4/

4/ Former 18 U.S.C. § 434, reads as follows:

"Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than \$ 2,000 or imprisoned not more than two years, or both." (Emphasis added.) The amended version of 18 U.S.C. § 434 is now codified at 18 U.S.C. § 208 (1970), see footnote 3. In Senate Report No. 2213, September 29, 1962, which accompanied the bill creating 18 U.S.C. § 208 (1970), the following was stated:

"Section 208. Acts affecting a personal financial interest

"Subsection (a) is modeled on title 18, United States Code, section 434 which disqualifies an employee of the Government who has an interest in the profits or contracts of a business entity from the transaction of business with such entity. However, subsection (a) improves upon the present law by abandoning the limiting concept of the 'transaction of business.' The disqualification

[1] The Attorney General, as head of the Department of Justice, and chief law officer of the Federal Government, represents the United States in legal matters generally, and gives advice and opinions to the President and to the heads of the executive departments of the Government when so requested. One of the chief functions of the Department of Justice is to construe the laws under which other departments act. 28 U.S.C. § 512 (1970). In this instance the Department of Justice has advised this Department that it is permissible for the spouse of a Member of Congress to hold a grazing lease for national resource lands under certain circumstances. 5/ We concur with the view of

of the subsection embraces any participation on behalf of the Government in a matter in which the employee has an outside financial interest, even though his participation does not involve the transaction of business. Section 208 also reaches further than present law by requiring the disqualification of an employee from participation in matters in which his spouse, child, or persons with whom he has business connections have an interest." (Emphasis added.)

The following comments were added to the report as the individual views of Senator Kenneth B. Keating:

"* * * In my judgement * * * [the bill] contains several serious omissions.

"Its most important defect is its failure to deal with conflict-of-interest problems affecting Members of Congress. The legislative branch, of course, has special problems, but these do not require an exemption of Congress from the same high ethical standards we intend to impose on the officers and employees of the other branches of the Government. There is no justification for a double standard of morality in Government, one for the Congress and another for the rest of the public service. The public will resent any 'holier than thou' attitude on the part of Congress, and properly so."

1962 U.S. CODE CONG. & AD. NEWS, 3852, 3862, 3865.

The adequacy of the standard of conduct which the Congressional branch of the Government applies to its members is not the issue before the Department. Rather, the issue is confined to the strictly legal question of the scope of the conflict of interest statute affecting Members of Congress, which can be presumed from the above to be narrower than 18 U.S.C. § 208 (1970), which "reaches further than present law" by including interests held by a spouse.

5/ Had the applicant been the spouse of a Federal employee, a contrary result could be required. See 18 U.S.C. § 208 (1970); 43 U.S.C. § 11 (1970); 43 CFR Part 7: 43 CFR 20.735-11(b) and 12(a); cf. Donald E. and Nancy P. Janson (On Reconsideration), 23 IBLA 374 (1976).

the Field Solicitor that this determination is binding on the Department of the Interior. Therefore, the only matter left open for review is whether the Melchers have satisfied the criteria set forth by the Justice Department which are required in order to avoid the proscriptions of 18 U.S.C. § 431 (1970).

In its letter to the Acting Secretary, the Justice Department stated that:

* * * [A]ny transaction between a Member of Congress and his spouse in connection with a Government contract should be subjected to close scrutiny by the Federal agency in question, to be sure that on the facts § 431 is not violated. Cf. Commissioner v. Tower, 327 U.S. 280, 291 (1946); Niles v. Milbourne, 100 F.2d 723, 725 (4th Cir., 1939). Any indication of a continuing interest of the Congressman in the ranch, or control (through contractual commitment, testamentary power or otherwise) over its disposition or the disposition of its profits, might suffice to render a grazing permit to his wife in violation.

We, as did the Office of the Solicitor, have reviewed the materials filed by Mrs. Melcher to determine whether they satisfied the conditions for avoiding a conflict of interest. The Board is also satisfied that the documents resulted in a complete divestment by Congressman Melcher of any interest or benefit from any grazing rights which might be granted to Mrs. Melcher. Under these circumstances, we conclude that it was proper for the [Illegible Word] issue a grazing lease to Ruth E. Melcher, her qualifications having been established. Cf. Eugene Prato, 5 IBLA 87 (1972) Duncan Miller, 71 I.D. 121 (1964), aff'd sub nom. McIntosh v. Udall, Civ. No. 1522-64 (D.D.C. June 29, 1965). 6/

6/ As for appellant's other arguments, we find nothing in the Melchers' activities to substantiate appellant's references to a "ploy" or "irregularities." The Congressman and his wife, just as other persons, have the opportunity to find out what their rights are, and having done so, to conform their arrangements to the law if they can. This, as far as the record shows, is what they have done.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge

